IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 28, 2007 Session

STATE OF TENNESSEE v. JAMES B. HUNTER

Direct Appeal from the Criminal Court for Hamilton County
No. 254188 Douglas A. Meyer, Judge

No. E2006-01173-CCA-MR3-CD - Filed July 23, 2007

The defendant, James B. Hunter, pled guilty to simple possession of marijuana and possession of less than .5 grams of cocaine in exchange for concurrent sentences of eleven months twenty-nine days, suspended, and three years, suspended on supervised probation, respectively. As a condition of his plea, pursuant to Tennessee Rule of Criminal Procedure 37(b)(2), the defendant reserved a certified question of law dispositive of the case regarding whether the police had reasonable suspicion to stop and detain his vehicle and had probable cause to search him and his property. Following our review of the record and the parties' briefs, we conclude that the officers had reasonable suspicion to stop the defendant but did not have probable cause to search the defendant or his vehicle. Therefore, all evidence gathered from this constitutionally impermissible search must be suppressed. Because the evidence is dispositive to the case at hand, we reverse the judgments of the trial court and dismiss this case.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Reversed and Case Dismissed

J.C. McLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and ROBERT W. WEDEMEYER, JJ., joined.

Lloyd A. Levitt, Chattanooga, Tennessee, for the appellant, James B. Hunter.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William H. Cox, District Attorney General; and Lila Statom, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

After being indicted by the Hamilton County Grand Jury for possession of marijuana with intent to sell or deliver and possession of cocaine with intent to sell or deliver, the defendant filed

a motion to suppress all the evidence against him. At the suppression hearing, Officer Cory Stokes with the Chattanooga Police Department testified that prior to April 1, 2005, law enforcement had received "a lot of calls about narcotic violations" in the Hughes Avenue area of Chattanooga. Officer Stokes was assigned to work in the Hughes Avenue district, along with Officer Joe Kerns, because it was a "problem area[] with narcotic violations, narcotic activities, so [they] were placed on special assignment to help clear up" the area. Officer Stokes explained that working a "special assignment" meant observing the activities going on from an unmarked vehicle in plain clothing. Officer Stokes said that if they noticed any activities that needed attention, they would call a marked police unit for assistance. Officer Stokes stated that he had been on special assignment once or twice prior to April 1, 2005, when the manpower was available.

Officer Stokes stated that he was working in this special assignment capacity on April 1, 2005, around 9:30 or 9:40 p.m., when he observed the defendant sitting in a black Ford Excursion adjacent to his residence, meaning the defendant was pulled to the side of the road one or two houses down from his residence. Officer Stokes noted that although it was dark outside, the defendant was parked across from a well-lit parking lot. Officer Stokes testified that over the course of an hour, three or four vehicles drove up to the defendant's car, a person would get out and get into the passenger side of the defendant's car for less than a minute, and then leave. Officer Stokes clarified that he saw several vehicles pull up to the defendant's car, but he only saw two white females actually get into the defendant's car. However, Officer Stokes admitted that the white females were not stopped and questioned. Officer Stokes said that he had a camera with which he "zoomed in on what was going on," but he did not make any type of recording.

Officer Stokes hypothesized that at some point someone must have tipped off the defendant because he drove around the block and then into his driveway, which prompted the officers to call for a marked patrol unit to stop the defendant. Officer Stokes recalled that shortly after the marked units pulled the defendant over, he approached the defendant's vehicle and was present when the vehicle was searched. Officer Stokes testified that the defendant had a calm demeanor. Officer Stokes said that he requested and received written consent from the defendant to search his residence and business, but he did not seek consent to search the defendant's vehicle.[1] Officer Stokes stated that the search of the defendant's vehicle revealed a small amount of drugs, specifically 3.2 grams of cocaine and 1.5 grams of marijuana, hidden in the sunglass compartment.

Officer Stokes noted that while he had not received any specialized narcotics training, he had been a patrol officer since 2003 and had made drug arrests in the past. Officer Stokes said that he was aware of how drug transactions generally took place because of his on-the-job training. Based on his training and experience, Officer Stokes believed that the activities going on around the defendant's car were consistent with narcotics activity. Officer Stokes admitted that he had not

[1] When questioned if he asked the defendant for consent to search his vehicle, Officer Stokes responded, "I didn't myself, no[.]" This response seems to imply that someone else received consent to search the defendant's vehicle. However, there is nothing in the record that indicates the defendant consented to the search, and the motion to suppress states that the search was without consent.

received specific complaints against the defendant in the past but only about narcotics activity in the area. Officer Stokes also acknowledged that he could not see what was going on inside the defendant's vehicle and admitted that he did not know what the defendant was discussing with the women. However, Officer Stokes asserted that "the activity they were having was consistent with a drug sale . . . because if you get in a vehicle for thirty seconds, that's not enough time to talk about anything."

Officer Stokes testified that on April 1, 2005, the co-defendant, Erron Jackson, was also in the vicinity and tried to flag the officers down twice with a hand gesture, "but [Mr. Jackson] really didn't know who we were and we continued going." This was when Officer Stokes and Officer Kerns circled the block once or twice and then parked where they eventually observed the defendant's vehicle. Officer Stokes said that Mr. Jackson's attempt to flag them down was one of the reasons why they watched that location. Officer Stokes could not recall whether the defendant's vehicle was already parked at the time Mr. Jackson tried to flag them down; therefore, he could not say that Mr. Jackson was trying to motion them toward the defendant's vehicle.

Officer William Curvin with the Chattanooga Police Department testified that he was working patrol on the evening of April 1, 2005, in the general vicinity of the Hughes Avenue area. Officer Curvin said that he had previously worked on special assignments like Officers Stokes and Kerns were working that evening. Officer Curvin explained that the special assignments had been set up because "it's a real heavy drug area, lot of crime, lot of violent crime also, assaults and things, a lot of it is [drug] related."

Officer Curvin stated that on the evening of April 1, 2005, he received a call on the radio that he needed to stop a particular vehicle for known drug activity, so he and two other officers simultaneously pulled the defendant over in his driveway. Officer Curvin remembered that Officer McCoy[2] was one of the other officers, but he could not recall the third officer. When asked, Officer Curvin said that he probably had his blue lights on when the defendant was pulled over, and he was sure Officer McCoy, the driver of the first car, had on his blue lights. Once the defendant was stopped, Officer Curvin observed Officer McCoy and another officer interacting with the defendant. Officer Curvin noted that the defendant appeared to be intoxicated because he "seemed unsteady, slurred speech, alcohol smell, obviously he had been drinking." Officer Curvin noted that the other officers arrested and detained the defendant and searched his vehicle. Officer Curvin stated that the defendant appeared to be under arrest prior to the search of his vehicle. Officer Curvin recalled that while searching the vehicle, Officer McCoy said, "[H]ey, I found it," and pulled out multiple bags of cocaine. Officer Curvin later saw the defendant sign a paper consenting to a search of his home and business. Officer Curvin admitted that he did not observe any illegal behavior on the defendant's part and only pulled him over because of the other officers' request.

Following the hearing, the trial court denied the defendant's motion to suppress, stating, "[I]t's not just an articulable suspicion but the officer's training and experience tells him that when

[2] Officer McCoy was working in Kosovo at the time of the suppression hearing.

he sees someone get in a car for less than thirty seconds, gets back out, that obviously it's a drug deal in a drug neighborhood." Thereafter, the defendant pled guilty to simple possession of marijuana and possession of less than .5 grams of cocaine, while reserving the following two-part certified question of law:

> Whether there was reasonable and articulable suspicion to believe that the Defendant had committed or was about to commit a crime so as to allow law enforcement officers to stop and detain the Defendant's vehicle and the Defendant.
>
> Whether there was probable cause to search the Defendant and his property.

As noted in the final judgment, the parties consented to the reservation of the certified question, agreed that it was dispositive of the case, and clearly identified the scope of the legal issue reserved.[3] We agree that the issue is dispositive and conclude that the matter is properly before this court.

ANALYSIS

When reviewing the trial court's decision on a motion to suppress, this court conducts a de novo review of the trial court's conclusions of law and application of law to facts. *See State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001). However, the trial court's findings of fact are presumed correct unless the evidence contained in the record preponderates against them. *See State v. Daniel*, 12 S.W.3d 420, 423 (Tenn. 2000). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *State v. Lawrence*, 154 S.W.3d 71, 75 (Tenn. 2005) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). Moreover, the prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence. *State v. Hicks*, 55 S.W.3d 515, 521 (Tenn. 2001).

Both the state and federal constitutions protect individuals from unreasonable searches and seizures. *See* U.S. Const. amend. IV; Tenn. Const. art. I, § 7. Therefore, a search or seizure conducted without a warrant is presumed unreasonable and any evidence discovered subject to suppression. *See Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971); *State v. Bridges*, 963 S.W.2d 487, 490 (Tenn. 1997). However, the evidence will not be suppressed if the state proves that the warrantless search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement. *State v. Binette*, 33 S.W.3d 215, 218 (Tenn. 2000).

Reasonable Suspicion to Stop

The defendant first asks whether the officers had reasonable suspicion to believe that he had committed or was about to commit a crime in order to stop him. This question involves one of the narrow exceptions to the warrant requirement when a police officer initiates an investigatory stop

[3] The procedure for reserving a certified question of law is found in Tennessee Rule of Criminal Procedure 37(b)(2)(A).

based upon specific and articulable facts that the defendant has either committed a criminal offense or is about to commit a criminal offense. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Binette*, 33 S.W.3d at 218. This narrow exception has been extended to the investigatory stop of vehicles. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975); *State v. Watkins*, 827 S.W.2d 293, 294 (Tenn. 1992). In evaluating whether reasonable suspicion is based on specific and articulable facts, we must consider the totality of the circumstances, including the personal observations of the police officer, information obtained from other officers or agencies, information obtained from citizens, and the pattern of operation of certain offenders. *Watkins*, 827 S.W.2d at 294. We must also consider the rational inferences and deductions that a trained police officer may draw from the circumstances. *Id.* (citing *Terry*, 392 U.S. at 21). Reasonable suspicion for an investigatory stop will be found to exist only when the events which preceded the stop would cause an objectively reasonable police officer to suspect criminal activity on the part of the individual stopped. *State v. Levitt*, 73 S.W.3d 159, 172 (Tenn. Crim. App. 2001); *State v. Norword*, 938 S.W.2d 23, 25 (Tenn. Crim. App. 1996).

Addressing whether the officers had reasonable suspicion to stop and detain the defendant,[4] the record reflects that on April 1, 2005, Officer Stokes was participating in a plain clothes, special assignment in the Hughes Avenue district to help curb drug activity in the area. Prior to this date, law enforcement had received numerous calls about drug activity in the area, and the area had a reputation for high levels of drug activity. While Officer Stokes and his partner were patrolling the Hughes Avenue area, they twice saw Erron Jackson, the co-defendant, use a hand gesture to try and stop the officers. Mr. Jackson's attempt to flag the officers down was one of the compelling reasons they stopped to observe that particular location.

Although it is not clear whether the defendant was present when the officers stopped to watch the area, the officers eventually observed the defendant sitting in his vehicle parked on the side of the road two or three houses from his residence. The officers observed the defendant for an hour, during which time they saw several vehicles pull up to the defendant's car and specifically saw two white females approach the defendant's vehicle, at different times, and get inside. Each of the two females got into the defendant's car for less than a minute and then got out and left. Officer Stokes believed, based on his experience and training, that drug transactions were occurring in the defendant's vehicle because "thirty seconds . . . [is] not enough time to talk about anything." Based on this belief, Officer Stokes called uniformed patrol units to execute a stop of the defendant's vehicle.

We are mindful that "[a]n individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable particularized suspicion that [a] person is committing a crime"; however, it is a relevant consideration in determining whether there was reasonable suspicion for a stop. *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). In this case, the

[4] The parties do not dispute that the defendant was seized, and we note that "[u]pon turning on the blue lights of a vehicle, a police officer has clearly initiated a stop and has seized the subject of the stop within the meaning of the Fourth Amendment of the Federal Constitution and Article I, section 7 of the Tennessee Constitution." *Binette*, 33 S.W.3d at 218 (citing *State v. Pulley*, 863 S.W.2d 29, 30 (Tenn. 1993)).

defendant was pulled over at Officer Stokes request after Officer Stokes observed the defendant engage in suspicious activity over the course of an hour. The defendant's brief encounters with at least two women, and his presence in an area of known drug activity, gave the officers reasonable suspicion based on specific and articulable facts that the defendant was involved in drug activity in order to conduct an investigatory stop of the defendant.

Probable Cause to Search

The defendant's second question asks whether the officers had probable cause to search him and his property. From the record, it appears that the officers' rationale for the search was as a search incident to arrest because the defendant was placed under arrest prior to the search. As such, this question centers on a second well-recognized exception to the warrant requirement – a search incident to a lawful custodial arrest. *See, e.g.*, *State v. Walker*, 12 S.W.3d 460, 467 (Tenn. 2000). Pursuant to this exception, when an officer places a citizen under lawful custodial arrest, that officer is permitted to make a warrantless search incident to the arrest. *See United States v. Robinson*, 414 U.S. 218, 235 (1973); *Walker*, 12 S.W.3d at 467; *State v. Crutcher*, 989 S.W.2d 295, 300 (Tenn. 1999). If the arrestee is the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile and any containers therein. *See New York v. Belton*, 453 U.S. 454, 460 (1981). However, the lawfulness of the search is determined by the lawfulness of the underlying arrest.

An officer may make a warrantless arrest if the officer has "probable cause to believe the person to be arrested has committed the crime." *State v. Lewis*, 36 S.W.3d 88, 98 (Tenn. Crim. App. 2000). Probable cause depends on whether the facts and circumstances and reliable information known to the officer at the time of arrest were "'sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense.'" *State v. Bridges*, 963 S.W.2d 487, 491 (Tenn. 1997) (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Our supreme court has defined "probable cause" as "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." *State v. Henning*, 975 S.W.2d 290, 294 (Tenn. 1998). "Probable cause must be more than a mere suspicion." *State v. Lawrence*, 154 S.W.3d 71, 76 (Tenn. 2005) (citing *State v. Melson*, 638 S.W.2d 342, 350 (Tenn. 1982).

In addressing whether the officers had probable cause to search the defendant and his vehicle, we reiterate that the officers had reasonable suspicion to conduct an investigatory stop of the defendant's vehicle based on Officer Stokes' observations. Reasonable suspicion, however, is a less demanding standard than probable cause. *See Bridges*, 963 S.W.2d at 492. The likelihood of criminal activity required for reasonable suspicion is not as great as that required for probable cause, and is "considerably less" than would be needed to satisfy a preponderance of the evidence standard. *United States v. Soklow*, 490 U.S. 1, 7 (1989); *see also State v. Keith*, 978 S.W.2d 861, 867 (Tenn. 1998). For the officers to conduct a warrantless arrest and search incident to arrest of the defendant, the officers would have had to learn facts during the investigatory stop that gave rise to probable cause that the defendant had committed a crime. *See, e.g.*, *State v. Ronald Lee Corlew*, No. 01C019202CR00059, 1992 WL 367806, at *1-2 (Tenn. Crim. App., at Nashville, Dec. 15, 1992)

(addressing a situation where defendant's behavior provided reasonable suspicion for an investigatory stop, and facts learned during the stop provided officer with probable cause to arrest).

Our review reveals nothing in the record that indicates the officers learned of new information during the stop of the defendant that gave probable cause to search the defendant and his vehicle. No drug-related items were found in plain view, the officers did not indicate having smelled any suspicious odor, and the defendant had a calm demeanor during his interaction with the officers. The state suggests that the defendant's apparent intoxication when he was stopped provided probable cause to arrest, and the search was then pursuant to a lawful arrest. However, the defendant was not charged for driving under the influence, and the record does not show that the officers conducted a field sobriety test of the defendant to ascertain whether he was intoxicated. Because there is no evidence that the officers' reasonable suspicion ripened into probable cause, the arrest and subsequent search of the defendant was not lawful unless the officers had probable cause that the defendant had committed a crime at the inception of the stop.

According to the officer's testimony, the defendant was pulled over for "known drug activity." The "known drug activity," however, amounted to the defendant sitting in his car off to the side of the street and having brief encounters with two women. The women were not observed leaving the defendant's vehicle carrying anything, the women were not identified as known drug users, and Officer Stokes admitted that he could not see inside the defendant's vehicle to ascertain what was going on inside. Officer Stokes also admitted that law enforcement had not received complaints about the defendant as one being involved in drug activity. Officer Stokes' observations, while sufficient to stop the defendant for further investigation, were not sufficient to make a warrantless arrest and search of the defendant and his property. Accordingly, we conclude that the trial court erred in denying the defendant's motion to suppress the drug evidence obtained during the search of the defendant's vehicle and dismiss the case against the defendant.

CONCLUSION

Based on the above mentioned reasoning and authorities, we reverse the judgments of the trial court and dismiss the case.

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J.C. McLIN, JUDGE